JOHN TAN HONG NGUAN A

v.

KURNIA TUNGGAL SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
LEE HENG CHEONG JC
[SUIT NO: KK22-162-2011]
14 NOVEMBER 2012

CONTRACT: *Guarantee - Undertaking - Validity of - Claim for management fees pursuant to letter of undertaking and guarantee - Discrepancy in date pleaded in statement of claim and actual date in letter of undertaking and guarantee - Whether valid and enforceable - Whether discrepancies in dates prejudiced defendant - Whether claim allowed* C

The defendant, by a letter of undertaking and guarantee ('LUG') dated 18 April 2009, undertook to pay the management fees amounting to RM915,000 to the plaintiff upon the defendant being awarded two construction projects, package 1A and package 1B ('the projects'). Thus, the plaintiff's claim against the defendant was based on the LUG. The defendant, on the other hand, contended that the said LUG was invalid, void and without effect in law. The defendant contended that the date of the LUG pleaded in the statement of claim was 16 April 2009 when the actual date of the LUG was 18 April 2009. The defendant further contended that if the LUG was dated 18 April 2009, there was no *consensus ad idem* by the parties that it covered package 1A of the said project since on that date, the relevant contract documents for package 1A of the said project was already signed and awarded to the defendants. Thus, the defendant contended that the LUG only covered package 1B of the project. The defendant also lodged a counterclaim against the plaintiff for damages and losses in the sum of RM1,617,690.95 or alternatively for damages to be assessed by the court claiming that the plaintiff had used the defendant's name for his own dealing and benefit from January 2008 until December 2009 and that the plaintiff had entered into various transactions with third parties without the defendant's approval, knowledge and consent. The issues that arose for determination were (i) whether the LUG dated 18 April 2009 was null and void; (ii) whether the plaintiff was entitled to claim the management fees from the defendant pursuant to the LUG; and (iii) whether the plaintiff had misused the defendant for his own business interest and caused the defendant to suffer loss and damage in the sum of RM1,617,690.95. D E F G H I

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1) The LUG dated 18 April 2009 was not null and void even though there was a difference in the dates of the LUG pleaded and the actual date on the LUG. The defendant was not misled or prejudiced as the defendant knew from the very outset that the date of the LUG was 18 April 2009 and not 16 April 2009. Therefore, the LUG was valid and enforceable. From the interpretation of the LUG, the letter covered both package 1A and package 1B of the project. The heading of the LUG clearly stated both package 1A and package 1B of the project and the court could not find any clause in the LUG which excluded package 1A of the project from the LUG. In the premises, the court held that package A of the said project was covered by the LUG. (paras 9, 10 & 12)

(2) The burden of proof in respect of the counterclaim rests on the defendant. In this regard, DW2 had failed to substantiate his allegation or state the reasons as to why the letters were fabricated. The defendant had failed to substantiate the contents of the said draft audit report, to prove that the defendant suffered losses and damages which constituted the defendant's counterclaim and also did not verify the debts of the defendant. Thus, there was a grave doubt as to whether the alleged losses and damages suffered by the defendant was genuine. The defendant had failed to prove its counterclaim against the plaintiff. (paras 25 & 26)

For the plaintiff - M/s Al Legal Chamber
For the defendant - Saiful Mokhtar (Stand in); M/s Marzuki Spawi & Co

Reported by Sandra Gabriel

JUDGMENT

Lee Heng Cheong JC:

Background

[1] The plaintiff's case is that the defendant, by a letter of undertaking and guarantee dated 18 April 2009, the defendant undertook to pay management fees amounting to RM915,000 to the plaintiff upon the defendant being awarded the project for the construction and completion of Sandakan Polytechnic (earthworks and infrastructure for RM15,200,000) (package 1A)/and construction and completion of Sandakan Polytechnic infrastructure works and building for RM65,000,000 (package 1B) ("the

said project") and upon the plaintiff's agreement to relinquish his directorship in the defendant at the stipulated time ("the said letter of undertaking and guarantee"). A

[2] The defendant on the other hand denied the plaintiff's claim and contended *inter alia* that the said letter of undertaking and guarantee is invalid, void and without effect in law. The defendant further lodged a counter claim against the plaintiff for damages and losses in the sum of RM1,617,690.95 or alternatively for damages to be assessed by this Honourable Court in that the plaintiff has used the defendant's name for his own dealing and benefit from January 2008 until December 2009 and that the plaintiff had entered into various transactions with third parties without the defendant's approval, knowledge and consent. B C

Agreed Issues For Trial

[3] The parties have agreed to the following issues to be tried and they are as follows: D

(i) Whether the letter of undertaking and guarantee dated 18 April 2009 is null and void and without effect in law?

(ii) Whether the plaintiff is entitled to claim the management fees from the defendant pursuant to the letter of undertaking and guarantee dated 18 April 2009? E

(iii) Whether the plaintiff had misused the defendant for his own business interest and/or benefit between January 2008 until December 2009 thereby causing the defendant to suffer loss and damage in the sum of RM1,617,690.95? F

(iv) Whether the plaintiff has usurped authority, commit illegal act and made use of the defendant for the plaintiff's own business interest/ and transactions which resulted losses for the defendant in the approximate sum of RM1,617,690.95 or as assessed by this Honourable Court. G

Consideration Of The Agreed Issues For Trial

Agreed Issue (i): Whether The Letter Of Undertaking And Guarantee Dated 18 April 2009 Is Null And Void And Without Effect In Law? H

[4] The defendant further contended that there is material difference in the dates of the said letter of undertaking and guarantee between the actual letter of undertaking and guarantee document and the date of the said letter of undertaking and guarantee pleaded in the statement of claim which stated as 16 April 2009 when the actual date of the said letter of I

A undertaking and guarantee was dated 18 April 2009. The above discrepancy in the dates, the defendant submitted, would be a basis for the plaintiff's claim to be dismissed.

[5] The defendant further contended that the pleaded case of the plaintiff was that they would rely on the said letter of undertaking and guarantee for its full term and effect and pleaded that it was signed on 16 April 2009 which differed from the date of the said letter of undertaking and guarantee ie, exh. A at pp. 6 to 9, which was dated 18 April 2009. In the light of the aforesaid the defendant submitted that the plaintiff is bound by its own pleadings and as such the plaintiff's case must fail.

[6] The defendant contended that the said letter of undertaking and guarantee only covers package 1B of the said project as the contract document between the defendant and the employer of the said Project, was signed on 17 November 2008, also p. 1 of exh. A stated that the letter of acceptance issued by JKR Malaysia, was on 23 July 2008 and the tarikh milik tapak bina was on 15 August 2008. The defendant further contended that if the said letter of undertaking and guarantee was dated 18 April 2009, there was thus no consensus *ad idem* by the parties that it covered package 1A of the said Project since on that date, the relevant contract documents for package 1A of the said Project was already signed and awarded to the defendants ie, the said letter of acceptance from JKR Malaysia, was issued on 23 July 2008 and the signing of the contract of the said Project was on 17 November 2008.

[7] The plaintiff in response contended that the whole process of securing the said Project took about two years before the said letter of award for package 1A of the said Project was eventually issued to the defendant and that the award of the said project was split into package 1A and package 1B because the earthwork (package 1A) itself could take up to one year to complete and that the design for the building works (package 18) was not ready at the time of the award of package 1A.

[8] The plaintiff further contended that although the date of the said letter of undertaking and guarantee was typed as 16 April 2009 in para. 3 of the statement of claim, the defendant was not misled by the plaintiff's pleading as evidenced from para. 2 of the statement of defence (at p. 5 of BOP) where the defendant specifically pleaded that "... the defendants never executed the said letter of undertaking and guarantee dated 18 April 2009 ...".

[9] This court finds that the above letter of undertaking and guarantee dated 18 April 2009 is not null and void even though there was a difference in the dates of the said letter of undertaking and guarantee pleaded and the actual date on the said letter of undertaking and

guarantee as this court finds that the defendant was not misled or prejudiced as the defendant knew from the very outset that the date of the said letter of undertaking and guarantee is 18 April 2009 and not 16 April 2009, otherwise, the defendant would have stated the date of the said letter of undertaking and guarantee as 16 April 2009 following the mistake of the typographical error in the statement of claim.

[10] In the light of the above this court finds that the said letter of undertaking and guarantee is valid and enforceable.

Agreed Issue (ii): Whether The Plaintiff Is Entitled To Claim The Management Fees From The Defendant Pursuant To The Letter Of Undertaking And Guarantee Dated 18 April 2009?

[11] The relevant portion of the said letter of undertaking and guarantee states as follows:

> Date: 18 APR 2009
>
> LETTER OF UNDERTAKING AND GUARANTEE
>
> To:
>
> JOHN TAN HONG NGUAN
>
> …
>
> Projek: Cadangan Membina Dan Menyiapkan Politeknik Sandakan, Sabah- Pakej 1A (Kerja Infrastrukur Bangunan Akademik) and P1B (kerja Bangunan Akademik) (hereinafter referred to as "the Project
>
> In consideration of your granting time, disclosing business information, making introduction, providing general liaison and coordination works and assistance, which leads to the grant and award of contract of the aforesaid project by Government of Malaysia to our company or related company, namely KURNIA TUNGGAL SDN BHD (Company No. 503406-K).
>
> We, KURNIA TUNGGAL SDN BHD (Company No. 503406-K), do hereby with full corporate authority and responsibility and without protest irrevocably duly agree, undertake and guarantee to pay the management fees at the rate of One decimal five percent (1.5%) of the Final Contract Sum of the aforesaid Project to be determined.
>
> …
>
> TAKE NOTICE THAT the validity of this Undertaking and Guarantee is subject to your agreement to relinquish and in fact relinquished your directorship in the company with immediate effect.

[12] As regards the issue whether the said letter of undertaking and guarantee covered package 1A and /or package 1B of the said Project, this court finds that from the circumstances of the case and the interpretation of the said letter of undertaking and guarantee, the said letter covered both package 1A and package 1B of the said Project. The heading of the said letter of undertaking and guarantee clearly stated both package 1A and/or package 1B of the said Project and this court cannot find any clause in the said letter of undertaking and guarantee which excluded package 1A of the said Project from the said letter of undertaking and guarantee. In the premises this court holds that package A of the said Project is covered by the said letter of undertaking and guarantee.

[13] Further this court is also persuaded by the content of the letter dated 5 January 2010 (refer to p. 17 of Bundle "A") which is a letter from the defendant to the plaintiff's lawyers. This court shall reproduce the relevant portion of the said letter dated 5 January 2010:

> We wish to state our intention to fulfill our commitments as per the Letter of Undertaking and Guarantee made to Mr John Tan Hong Nguan.
>
> In respect of the Construction and Completion of Sandakan Polytechnic-Earthworks and Infrastructure with the original contract sum of RM15,200,000.00. Please be informed that our interim accounts and records show that Mr John Tan Hong Nguan is in fact owing a certain amount to our company. Therefore the issue of failing, refusing and/or neglecting to pay the management fees to Mr John Tan Hong Nguan does not arise.

[14] Thus this court finds that the third paragraph of the said letter dated 5 January 2010 from the defendant, clearly showed that the defendant admitted that the said letter of undertaking and guarantee also covered package 1A as the defendant stated that they are not paying the management fees for package 1A, to the plaintiff because the plaintiff was still owing some monies to the defendant.

[15] This court holds that the said letter of undertaking and guarantee covered both packages 1A and 1B even though at the time, when the said letter of undertaking and guarantee was signed, package 1A was already awarded to the defendant in the year, 2008 for the reasons stated in the court's findings in respect of Agreed Issue (i).

[16] In the light of my finding in Agreed Issue (i), above, this court finds that the plaintiff is entitled to claim the management fees from the defendant pursuant to the letter of undertaking and guarantee dated 18 April 2009, for both packages 1A and 1B of the project.

Agreed Issue (iii): Whether The Plaintiff Had Misused The Defendant For His Own Business Interest And/Or Benefit Between January 2008 Until December 2009 Thereby Causing The Defendant To Suffer Loss And Damage In The Sum Of RM1,617,690.95? And

Agreed Issue (iv): Whether The Plaintiff Has Usurped The Authority, Commit Illegal Act And Made Use Of The Defendant For The Plaintiff's Own Business Interest/And Transactions Which Resulted Losses For The Defendant In The Approximate Sum Of RM1,617,690.95 Or As Assessed By This Honourable Court

[17] Agreed issues (iii) and (iv) shall be considered together as they are related. This court answers both agreed issues (iii) and (iv) in the negative on the following grounds.

[18] The defendant contended that the plaintiff has used the defendant's name for the Diamond Dynasty Hotel Project and incurred the debts as stated under in p. 24 of the defendant's bundle of documents. The defendant further contended that the defendant's witnesses, namely Mr Nixon Hj Habi ("DW1") and Abdul Majid Bin Palah ("DW2") confirmed that the defendant had no dealings whatsoever with the following companies namely, Asten Pave Sdn Bhd, Binajaya Construction, Claycorp Marketing (Sabah) Sdn Bhd, Diamond Dynasty Hotel Sdn Bhd, Deguan Marketing Sdn Bhd, Grorich Sdn Bhd Holijaya Sdn Bhd, Usaha Hakikat Sdn Bhd, Yun Tsang Air-Conditioning Service Sdn Bhd, Mr Ding Balan and Lu Lai Kien.

[19] The defendant also contended that the defendants are also being sued by Wan Lee Electrical Engineering (refer to pp. 12, 13 and 14 of the defendant's bundle of documents) and had to pay the sum of RM63,803.90 to Ryoden (Malaysia) Sdn Bhd for the debt incurred by the plaintiff and the defendant has no knowledge or given authority to anybody or the plaintiff to deal with the above companies on behalf of the defendant.

[20] The defendant further contended that the plaintiff was fully aware and had knowledge that the defendant was facing suits and debts because of his act and commission in using the defendant's name in transactions which were not authorised or consented to by the defendants.

[21] DW2 in his answers to Questions 17, 18, 19, 21, 22, 23, 24, 25, 26 and 27 of DW2-A, said that the PW1 had without his consent and authorisation from the board of director of the defendant, entered into contract with unknown third parties and that the letters from some of the creditors (refer to pp. 10 to 21 of exh. A) of the defendant, confirming that the defendant did not owe them monies, were fabricated by the plaintiff.

[22] However, during cross-examination of DW2, when asked to produce proof of such fabrication, DW2's answer was "Saya percaya dia sendiri yang buat, surat itu adalah bukti yang dia buat sendiri, saya tiada urusan dengan semua ini." (line 24 to 29 in p. 60 of NOP). Other than mere contentions, this court finds that there is no other credible evidence which would lend support to the defendant's aforesaid contention. In the premises, this court attaches no or little weight to such contention.

[23] In the premises this court shall also attach no or little weight to both DW1's and DW2's statements that the contents of the said letters (pp. 10 to 2l of exh. A) were fabricated by PW1.

(i) Thus this court finds that the plaintiff did not usurp the authority, commit illegal acts and made use of the defendant company for the plaintiff's own business interest/and transactions which resulted losses for the defendant in the approximate sum of RM1,617,690.95 and that the defendant failed to prove the losses and damages as all the alleged debts have been settled.

The Defendant's Counterclaim

[24] DW2 stated in cross-examination that the basis of the defendant's counterclaim in the sum of RM1,617,690.95 was based on the draft audit report (refer to pp. 24-25 of exh. B) and DW1 also stated that the said draft audit report prepared by Y F Ng & Co, was not lodged with the inland revenue department. Other than the said draft audit report, the defendant did not call any witness from Y F Ng & Co or produce any other evidence, to prove or explain the contents of the said draft audit report. The defendant, according to DW1, also did not verify the debts of the defendant (which formed the basis of the counterclaim) with any of the creditors.

[25] It is trite law that the burden of proof in respect of the counterclaim rests on the defendant. In this regard, this court finds that DW2 had failed to substantiate his allegation or state the reasons as to why the letters (refer to pp. 10 to 21 of exh. A) were fabricated. The defendant did not even bother to call any witness or expert to prove that the said letters (pp. 10 to 2l of exh. A) were fabricated by the plaintiff as alleged by DW2.

[26] This court finds that the defendant has failed to substantiate the contents of the said draft audit report, to prove that the defendant did in fact suffered losses and damages which constituted the defendant's counterclaim herein. The defendant, according to DW1, also did not verify the debts of the defendant. Thus there is a grave doubt as to whether the alleged losses and damages suffered by the defendant is genuine. Thus this court finds that the defendant has failed to prove its counterclaim against the plaintiff on a balance of probabilities.

Order

[27] In the light of the above findings, this court finds that the plaintiff has proved its case against the defendant on a balance of probabilities and order as follows:

(i) Judgment be entered in favour of the sum of RM915,000, being 1.5% of the monies that the defendant received for package 1B of the project, together with statutory interest of 5% from the date of judgment to date of full payment and costs on solicitors and clients' basis;

(ii) Since this court finds that the defendant had failed to prove its counterclaim on a balance of probabilities, this court dismisses the defendant's counterclaim with costs.